

App. 10/699,187
Amendment dated 9/25/2007

Applicant: John Guido

Remarks/Arguments

The Examiner has rejected Claims 1-3, 5-20 based on obviousness considerations, using various combinations of *Verhaeghe, Sanders et al., Cruess, and Studer*. No claims have been amended; Claims 3, 7 and 17 remain as originally presented. Claims 4, 11 and 16 were previously cancelled. Claims 9, 14, 18 were previously presented; therefore, Claims 1-3, 5-10, 12-15 and 17-20 remain in the application. No new matter has been added.

Reconsidered 35 USC §103 and §112 Rejections

Applicant appreciates and thanks Examiner for reconsideration and withdrawal of the rejections noted in Examiner's Office Action of 08/03/2007.

35 USC §103(a)

Applicant respectfully traverses the obviousness rejections of Independent Claims 1, 8 and 20 as the Examiner has failed to provide a *prima facie* case of obviousness.

A *prima facie* case of obvious requires that all claim limitations be taught or suggested (MPEP 2143.03). The Examiner appears to be using the benefit of applicant's specification (i.e., hindsight) to combine the references as claimed.

Applicant respectfully draws the Examiner's attention to *Graham v. John Deer*, 383 U. S. 1, at 36 which specifically warns against the temptation to read into the prior art the teachings of the invention at issue using the benefit of hindsight... (quoting "*Monroe Auto Equipment Co. v. Heckethorn Mfg. & Supply Co.*," 332 F. 2d 406, 412 (1964)).

Applicant submits that none of the cited references teach, suggest or otherwise provide any motivation to arrive at the claim elements included in Claims 1, 8 and 20 of;

diverting a visually selected portion of said plurality of fresh produce from said shelf stable process into a fresh cut produce process, and

said fresh cut produce process being separate from said shelf stable process but consolidated within a shelf stable processing facility,

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Examiner's attention is respectfully drawn to the fact that the Applicant is not claiming which machine harvests the fresh produce, *Bettencourt et al.* (US 3,986,561) or *Studer* (US 4,232,506); how the fresh produce is cut *Dall'Argine et al.* (US 3,878,996) or *Verhaeghe* (US 2002/0170398A1); which modified atmosphere packaging (MAP) is used *Floyd et al.* (US 5,505,950) or *Sanders et al.* (6,213,302) to package the fresh cut produce; or a unitary shelf stable process *Cruess*.

Applicant notes that he has already overcome the reference to *Cruess* in combination with and *Bettencourt et al.* and *Floyd et al.* Simply substituting *Studer* for *Bettencourt et al.* and *Sanders et al.* for *Floyd et al.*, still does not teach, suggest or otherwise provide any motivation for one skilled in the art to arrive at the italicized claim elements discussed above. The references to *Studer* and *Sanders et al.* do not provide any new information not previously overcome by the Applicant. (See Examiner's Final Office Action dated 03/22/2007.)

In addition, the Examiner has not provided any *supportable* reasons or evidence why one skilled in the art would combine these references to arrive at Independent Claims 1, 8 and 20. As such, the citation of equivalent art references in an attempt to develop a prima facie case of obviousness is essentially "piece-meal" examination which is to be avoided (See MPEP 707.07(g)).

Moreover, the U.S. Supreme Court in *KSR Int'l. Co., v. Teleflex, Inc* 550 U.S. _ (2007) specifically stated, "A patent composed of several elements is not proved obvious merely by demonstrating that each element was, independently, known in the prior art:"

and that there be an "apparent reason to combine the known elements in the fashion claimed by the patent [application] at issue. To facilitate review, this analysis should be made explicit."

The rationale advanced by the Examiner of greater cost savings and efficiency, is conclusory, not reasonably supported by the cited references and simply does not comport with the clear absence of any factual indication in the span of nearly 60 years of cited prior art, that the fresh cut produce and shelf stable processing could be combined as claimed.

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Accordingly, Examiner's conclusory statements without more are legally insufficient to provide a *prima facie* case of obviousness.

"[R]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." (*In re Kahn*, 441 F. 3d 977, 988 (CA Fed. 2006) cited with approval in KSR)

Cruess

All of the purported "separate" processes attributed to the *Cruess* reference are directed solely toward shelf stable processing. The tomato puree and tomato paste products produced by the processes taught by *Cruess* are both shelf stable products which have nothing to do with fresh cut produce products.

Studer

Studer is simply another mechanical harvester equivalent to that taught by *Bettencourt et al.* and does not teach or otherwise suggest that the harvested fresh tomatoes would be processed in a fresh cut produce process which is consolidated within a shelf stable processing facility.

Verhaeghe

Applicant also notes that he has already overcome the reference to *Verhaeghe*. The instant office action specifically withdrew the combination of *Verhaeghe*, *Sanders and Bettencourt et al.* The relevant portion of Examiner's previous rejection based on *Verhaeghe* presented in the office action of March 22, 2007 is identical to the rejection presented in the instant office action. Nothing has changed in this later rejection based on *Verhaeghe* which still is directed toward the same machine to cut fresh tomatoes into slices.

As stated in Applicant's previous reply and reiterated here, (paragraph 0019 of *Verhaeghe*) "*As already explained above, left and right hand end slices (i.e., tops and bottoms) of vegetables and, more in particular of tomatoes, are not desired by the consumer as they possess less tasty components such as style pieces, stalk pieces, the sepal, calyx pieces, peduncle pieces, and root pieces. The invention solves these*

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inconveniences by offering a device that enables the collection of the desired slices only, being the intermediate slices. "

Verhaeghe thus teaches away from using the removed tops and ends for any purpose. As such, one of ordinary skill in the art would simply dispose of the removed pieces as garbage. Contrary to Examiner's opening sentence regarding *Verhaeghe* on page 3 of the office action, Applicant respectfully points out that *Verhaeghe* does not involve shelf stable processing whatsoever, nor is there any teaching or suggestion of such contained anywhere therein. Shelf stable processing requires that the input into the process be heat treated (i.e., cooked.) *Verhaeghe* is simply a machine to cut fresh tomatoes into slices which is entirely unrelated to self stable processing (e.g., canning.)

Accordingly, Applicant respectfully submits that this reference to *Verhaeghe* is rendered moot in light of Applicant's responses to Examiner's previous and instant office action which overcame *Verhaeghe*.

Summary

The combinations of *Cruess, Bettencourt et al. and Floyd et al.*, and *Verhaeghe, Sanders and Bettencourt et al.* have previously been overcome, resulting in no available combinations which read on Independent Claims 1, 8 or 20;

there is simply no evidence or suggestion in the cited combinations of *Verhaeghe, Sanders et al., Cruess, and Studer* for the combined fresh cut produce and self stable process as claimed;

the Examiner has not provided any evidence that it was conventional in the art to combine a fresh cut produce and self stable process;

the Examiner has not provided a sufficient reason or explicit analysis of why the disclosures of the references should be combined;

there is no suggestion to combine the teachings and suggestions of *Verhaeghe, Sanders et al., Cruess, and Studer*, as advanced by the Examiner, except from using Applicant's disclosure as a template through a hindsight reconstruction of Applicant's claims; and,

as Applicant has previously stated, fresh cut produce processing and shelf stable produce processing have been, and continue to be, separate unrelated industries with no

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"cross pollinization." This is not only the opinion of the Applicant and Applicant's Representative, Applicant herein incorporates by reference the accompanying 37 CFR § 1.132 declaration provided by Mr. Christopher Rufer, President of The Morning Star Packing Company, the world's largest tomato processing company.

Accordingly, for the reasons set forth above, Applicant submits that Independent Claims 1, 8 and 20 are novel and non-obvious and respectfully requests reconsideration and withdrawal of the 35 USC § 103(a) rejections made in the office action dated August 08, 2007. Dependent Claims 2, 3, 5-7, 10, 12-15, 17-19 all depend from their respective Independent Claims 1, 8 or 20 and include all of the limitations provided therein. Since Claim 1, 8 and 20 as presented herein are believed novel and non-obvious, therefore it is respectfully submitted that Dependent Claims 2, 3, 5-7, 10, 12-15, 17-19 are likewise novel and non-obvious as well.

Furthermore, it is respectfully submitted that Dependent Claim 2, 3, 5-7, 10, 12-15, 17-19 recite additional limitations that independently renders them patentable over the cited art to the various combinations of *Verhaeghe*, *Sanders et al.*, *Cruess*, and *Studer*. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the Examiner's obviousness rejections of Dependent Claims 2, 3, 5-7, 10, 12-15, 17-19.

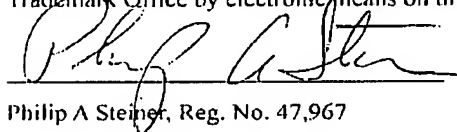
Accordingly, Applicant respectfully requests a timely notice of allowance be issued in this case. In the event the Examiner wishes to discuss any aspect of this response, please contact the attorney at the telephone number identified below.

Respectfully Submitted,



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I hereby certify that this correspondence is being transmitted to the United States Patent and Trademark Office by electronic means on this date of September 25, 2007.


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